(1) 95-1595

Supreme Court, U.S.
FILED
APR 3 1996

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, which limits descent and devise of certain minor fractional interests in Indian lands, results in a taking of private property without the payment of just compensation in violation of the Fifth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee Ricker were plaintiffs/appellees in the courts below.

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The Solicitor General, on behalf of the Secretary of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 67 F.3d 194. The opinion of the district court (App., *infra*, 13a-26a) is reported at 857 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. App., *infra*, 1a. A petition for rehearing was denied on December 5, 1995. App., *infra*, 41a-42a. On February 23, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, provides:

> (a) Escheat to tribe; rebuttable presumption
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interests represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of the decedent's death. Where the fractional interest

> has earned its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.
>
> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

STATEMENT

1. Pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and other federal statutes dating back to the end of the 19th century, much of the land on Indian reservations was divided into specific tracts that were allotted in trust or restricted status to individual Indians. As the individual interests passed down through successive generations of the original allottees' descendants, they were splintered into mul-

tiple undivided interests, making the property costly to administer and difficult to put to productive use. Congress recognized that problem as early as 1928, and ceased further allotment of Indian lands in 1934. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Ownership of the existing allotted lands, however, continued to splinter, exacerbating the problems recognized in the 1920s. Finally, in 1983, Congress enacted the Indian Land Consolidation Act (ILCA), Pub. L. No. 97-459, 96 Stat. 2519, 25 U.S.C. 2201 *et seq.*, to correct the serious problems caused by extreme fractionation of ownership of allotted Indian lands. See generally *Hodel* v. *Irving*, 481 U.S. 704, 706-709 (1987).

As initially enacted, Section 207 of the ILCA, 25 U.S.C. 2206 (Supp. II 1984), provided that undivided interests representing 2% or less of the acreage of a tract and earning less than $100 in the year prior to the owner's death could not pass by devise or descent, but would instead escheat to the Tribe upon the owner's death. In *Hodel* v. *Irving*, this Court held that that provision of the ILCA was unconstitutional. 481 U.S. at 718.

2. In 1984, while *Hodel* v. *Irving* was working its way to this Court, Congress amended Section 207 of the ILCA. Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172. The amendments made three changes of significance for present purposes.

First, unlike the original Section 207, which abolished descent and devise of covered fractional interests even when it would result in consolidation of interests in a parcel of land, the amended Section 207 permits the testamentary devise of fractional interests to persons who already own an interest in the same parcel. 25 U.S.C. 2206(b).

Second, although the original Act provided for escheat of a fractional interest that represented 2% or less of the acreage in the parcel and "has earned to its owner less than $100 in the preceding year before it is due to escheat," the amended version relaxes that provision to apply only where the interest of 2% or less is "incapable of earning $100 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a). The amended version further provides that, if the interest "has earned * * * less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent." *Ibid.*

Third, the amended Act provides that, notwithstanding the escheat provision of the ILCA, any Indian Tribe, subject to the Secretary of the Interior's approval, may adopt its own code of laws governing the disposition of escheatable interests. The Secretary may not, however, approve any tribal code "that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. 2203(c).

Although Section 207 had already been amended by the time this Court decided *Hodel*, all of the property at issue in *Hodel* had escheated under the original version of the Act. This Court therefore expressly declined to decide the constitutionality of the amended Section 207. 481 U.S. at 710 n.1. This case squarely presents that issue.

3. Respondents Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee Ricker are enrolled members of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. They are

children of William Youpee, who died testate on October 19, 1990, at the age of 75. App., *infra*, 7a, 27a-28a. William Youpee, also an enrolled member of the Fort Peck Tribes, owned undivided fractional interests in allotted trust land on several Indian reservations. William Youpee's will bequeathed his entire interest in each of a number of allotments to a single devisee; the will therefore perpetuated the existing fractionation, but did not exacerbate it. Respondents were among the devisees. See *id.* at 29a-33a.

On April 28, 1992, following a probate hearing at which he explained that certain of William Youpee's interests would escheat to various Tribes under the amended ILCA, the Administrative Law Judge (ALJ) in the Department of the Interior issued an order approving Youpee's will and decreeing the partial distribution of Youpee's estate.[1] App., *infra*, 27a-40a. In his partial decree, the ALJ ruled that, under the amended ILCA, Youpee's interest in five of the twelve allotments bequeathed to respondents escheated to the tribal governments of the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations, where the allotments were located. *Id.* at 7a, 20a, 36a-39a. That decision was based on uncontested certifications by the Bureau of Indian Affairs (BIA) that William Youpee had a 2% or less undivided interest in each of those allotments, that the allotments could not satisfy the "capable of earning $100 annually" requirement of the ILCA, and that the designated

[1] Issuance of a final decree was postponed pending the determination of the status of Robert Martin, a member of the Fort Peck Tribes, who claimed that William Youpee was his father. App., *infra*, 20a.

devisee was not an owner of an existing share of that allotment.[2] C.A. Excerpts of Record (E.R.) 18-38.

Respondents appealed the decree of partial distribution to the Interior Board of Indian Appeals (IBIA), contending that the escheat of Youpee's land was unconstitutional. On August 25, 1992, the IBIA dismissed respondents' appeal because it was without jurisdiction to determine constitutional issues. See App., *infra*, 7a.

4. On February 5, 1993, respondents filed suit in the United States District Court for the District of Montana against the Secretary of the Interior, alleging that the ILCA, as amended, violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. The district court acknowledged that the amended ILCA "avoids the escheat of certain interests which may have been

[2] The only allotment interest bequeathed to Marvin K. Youpee, Sr., escheated. One of the two interests in allotments bequeathed to Cary G. Youpee escheated. One of the two interests in allotments bequeathed to Allen F. Youpee escheated. Two of the eight interests in allotments bequeathed to Helen Youpee Ricker escheated; four of the remaining six fractional interests were small enough to have escheated, but they did not escheat because Helen Youpee Ricker already owned an interest in those allotments. See 25 U.S.C. 2206(b); App., *infra*, 34a, 37a (referring to interests bequeathed in Clause Fourteenth of decedent's will, including Hugh Eagle Bear, Lame Soldier, Little Head, and Bertha Little Head allotments). Certain interests in other allotments that were bequeathed to other devisees, who did not join in this suit, also escheated. See App., *infra*, 31a (interest of Williamette Bussard), 32a (same), 33a (interest of Darlan D. Youpee); E.R. 22-25, 30, 34. For purposes of these calculations, we count the interests in surface and mineral rights to a single allotment as a single interest.

escheated under the original ILCA," and, "[t]o that extent, the impact of the regulation is mitigated." App., *infra*, 25a. The court also acknowledged that the amended ILCA "corrects the defect [in the original Act] of abolishing devises which would result in consolidation." *Id.* at 23a; see *id.* at 25a. "To that extent," the court continued, "it further promotes the legitimate government interest here of ameliorating fractionation," which the court "agree[d] is a most serious problem." *Ibid.* The court nonetheless found it significant that, because the amended ILCA does not permit the devise of covered fractional interests to lineal descendants who do not already have an undivided interest in the same allotment, it "places many Indian land owners in the [position] of either devising land to a collateral heir or allowing the land to escheat to the tribe." *Id.* at 23a. For that reason, the court held that the amended ILCA violates the Just Compensation Clause, and it enjoined the escheat of the fractional interests at issue. *Id.* at 25a.

5. The court of appeals affirmed. App., *infra*, 1a-12a. Although it agreed that language in *Hodel* v. *Irving* "supports the Government's position that the United States can restrict the descent of fractional interests * * * [and] also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional," *id.* at 11a, the court concluded that the "nature of the Government's regulation of the decedent's land" goes too far by limiting the class of eligible devisees to "a very limited group," which, it believed, "is unlikely to contain any lineal descendants," *id.* at 10a, 11a-12a.[3]

[3] The court did not advert to the fact that one of the respondents in this case—Helen Youpee Ricker—is a child of William Youpee and avoided escheat of interests in several allotments because she already owned interests in them. See note 2, *supra*.

The court was of the view that, because "[t]he amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel," it "continues to completely abolish one of the sticks in the bundle of rights." *Id.* at 12a. The court therefore held that the amended Act violates the Just Compensation Clause. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held the amended Indian Land Consolidation Act (ILCA) unconstitutional. The amendments significantly mitigate the impact of the Act on a decedent's ability to pass property by devise or descent, thereby correcting the constitutional defects that this Court found in the original version of the Act involved in *Hodel* v. *Irving*. The court of appeals' decision, by unduly expanding the scope of this Court's holding in *Hodel* v. *Irving*, creates new limits on the historical ability of the United States and other sovereigns to regulate the disposition of property at death. It also thwarts the government's ability to ameliorate the problems caused by severe fractionation of Indian lands, despite this Court's recognition that "encouraging the consolidation of Indian lands is a public purpose of high order." *Hodel* v. *Irving*, 481 U.S. at 712. Consistent with that purpose, in the almost nine years that have passed since this Court's decision in *Hodel* v. *Irving*, the amended ILCA has been applied in the probate of thousands of estates. The decision below casts a cloud over the settlement of these estates and will, if allowed to stand, substantially frustrate the ongoing

implementation of this important Act of Congress. Further review is therefore warranted.

1. In *Hodel* v. *Irving*, this Court held that the original version of the ILCA was unconstitutional because it effected a taking of private property without just compensation. The Court analyzed the provisions of the original version in accordance with the three-part inquiry derived from *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), which takes into account the economic impact of the regulation, the extent of its interference with reasonable investment-backed expectations, and the character of the governmental action. See 481 U.S. at 713-714.

First, the Court noted that the original Act's economic impact on property owners "can be substantial." 481 U.S. at 714. The Court recognized that the whole of the decedents' property interests had not been taken by Section 207, because they "retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*." *Id.* at 715. But the Court reasoned that the "remainder" interest may constitute a substantial portion of the value of the property. *Ibid.*

Second, the Court concluded that "[t]he extent to which any of [the parties] had 'investment-backed expectations' in passing on the property is dubious." 481 U.S. at 715. The Court noted that "the property ha[d] been held in trust for Indians for 100 years" and that interests in it were "overwhelmingly acquired by gift, descent, or devise." *Ibid.* Furthermore, because of the "highly fractionated ownership," such property is "generally held for lease rather than improved and used by the owners." *Ibid.*

Third, the "character of the governmental action" had two aspects. The fact that there was some "average reciprocity of advantage" when small fractional interests are consolidated in the hands of a Tribe "weigh[ed] weakly in favor of the statute." 481 U.S. at 715. Indeed, the Court noted, "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Ibid.* Thus, the Court concluded that, if it "were to stop [its] analysis at that point, [it] might well [have found] § 207 constitutional." *Ibid.* But the fact that the Act amounted to a "complete abolition of both the descent and devise of a particular class of property," *id.* at 717, tipped the scales to require a finding of unconstitutionality, *id.* at 716-718.

2. Because the amended version of the Act substantially ameliorates the defects of the original version before the Court in *Hodel* v. *Irving*, the court of appeals erred in concluding that the amended Act is unconstitutional.

First, the economic impact of the amended Act is less than that of the original version. The version before the Court in *Hodel* v. *Irving* required escheat of any fractional interest of 2% or less that had "earned to its owner less than $100 in the preceding year before it is due to escheat." 481 U.S. at 709. In analyzing the economic impact of that provision, the Court specifically pointed out that there were suggestions in the legislative history of the 1984 amendments to Section 207 that "the failure to 'look back' more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests." *Id.* at 714. Even very valuable property interests may fail to

generate income in a given year, and the original Act's rigid use of a one-year frame of reference could thus exacerbate the economic impact of the escheat.

The amended Act employs a much more flexible standard to ensure that a property interest is genuinely *de minimis* in value before it escheats. The amended Act replaces the rigid $100-in-the-prior-year limitation with a standard permitting escheat only if the property "is incapable of earning $100.00 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a).[4] That standard ensures that only interests that are truly minor—and whose maintenance therefore requires a disproportionately large administrative cost—will escheat.

Second, unlike the version before the Court in *Hodel* v. *Irving*, the amended Act no longer prohibits the devise of minor fractional interests. Thus, in *Hodel*, the Court emphasized the fact that the Act "effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—*as for instance when the heir already owns another undivided interest in the property.* Cf. 25 U.S.C. § 2206(b) (1982 ed., Supp. III)." 481 U.S. at 716 (emphasis added). The Court further noted that "[w]hat is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property." 481 U.S. at 718.[5]

The amended Act remedies that defect by permitting devise (but not descent) of property if the devisee already owns an interest in the same parcel; it provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). Significantly, the Court in *Hodel* v. *Irving* cited that feature of the amended Act in the emphasized passage quoted above. And that provision operated in this case to permit the devise of otherwise escheatable interests to respondent Helen Youpee Ricker. See note 2, *supra*. The 1984 amendments thereby significantly loosened the

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[4] The amended Act provides for a rebuttable presumption that the statutory standard is satisfied "[w]here the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death." 25 U.S.C. 2206(a). As we explained in our brief in *Hodel* v. *Irving*, at 10, this provision read literally would seem to require an interest to earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. 31,715 (1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with that construction of the provision.

[5] The Court repeatedly used the absolute verbs "abolish" and "abrogate," and the adjectives "complete" and "total," in describing the sort of restrictions on descent and devise that were so extraordinary as to require a finding of a taking in *Hodel* v. *Irving*. See 481 U.S. at 716 ("the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property"); *ibid.* ("[e]ven the United States concedes that total abrogation of the right to pass property is unprecedented"); *ibid.* ("this statute effectively abolishes both descent and devise"); *id.* at 717 ("a *total* abrogation of these rights cannot be upheld"); *ibid.* (referring to Court's "holding that complete abolition of both the descent and devise of a particular class of property may be a taking"); *ibid.* ("The difference in this case is the fact that both descent and devise are completely abolished").

restrictions on devise, and they tailored those restrictions closely to the purpose of avoiding the perpetuation or exacerabation of fractionation of allotment interests.

Finally, the amended Act fares better than the version in *Hodel* v. *Irving* in another respect. As Justice Stevens pointed out in that case, the original version "became effective the day it was signed into law"—January 12, 1983. 481 U.S. at 732 (Stevens, J., concurring in the judgment). Since the decedents in *Hodel* v. *Irving* died in March, April, and June, 1983, it was "not reasonable to assume that [the] decedents * * * had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners." *Id.* at 732-733. By contrast, the decedent in this case had approximately six years between the time the amended Act was passed—October 30, 1984, see Pub. L. No. 98-608, § 1(4), 98 Stat. 3172—and his death on October 19, 1990. Accordingly, he had ample opportunity to "put [his] affairs in order," 481 U.S. at 733 (Stevens, J., concurring in the judgment), by making *inter vivos* transfers of his minor fractional property interests—or of remainder interests in those property interests—or otherwise disposing of them and thereby avoiding escheat.

3. The court of appeals' conclusion is contrary to fundamental principles that have hitherto been accepted in both Indian and non-Indian contexts. In *Hodel* v. *Irving*, this Court began its discussion by recognizing that Congress has "broad authority to regulate the descent and devise of Indian trust lands." 481 U.S. at 712 (citing *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918)). Moreover, the Court expressly "reaffirm[ed] the continuing vitality of the long line of

cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 718.[6] The "adjustment of the rules" effected by the amended ILCA is within Congress's power under those principles.

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[6] See *Irving Trust Co.* v. *Day*, 314 U.S. 556 (1942) (law permitting a decedent's spouse to take an intestate share of the estate, notwithstanding any contrary provisions of the decedent's will, is constitutional); *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850) (recognizing "the power, which every state and sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it"); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898) ("[t]he right to take property by devise or descent is the creature of the law, and not a natural right"); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896) ("Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."); *United States* v. *Fox*, 94 U.S. 315, 320 (1876) ("The power of the State to regulate the tenure of real property within her limits * * * and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."); *Randall* v. *Krieger*, 90 U.S. (23 Wall.) 137, 148 (1875) ("the expectancy of heirs, apparent or presumptive, before the death of the ancestor" is "upon the same footing" with dower right, which "is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away"); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 202 (1825).

The decision of the court of appeals also has substantial practical importance. In *Hodel* v. *Irving*, the Court stated that "[t]here is little doubt that the extreme fractionation of Indian lands is a serious public problem." 481 U.S. at 718. The nature of the interests at issue in this case bears out that assessment. The interests that would have passed to respondents but that instead escheated under the ILCA ranged from .83% to 1.67% of the parcel involved, see E.R. 18, 19; their average annual income for the preceding five years ranged from zero to 93 cents, see E.R. 18, 29; and the estimated value of the escheated interests ranged from $18.33 to $244.44, see E.R. 19 & 31, 21. The costs of servicing and keeping records of those interests are disproportionate to the income or value of the interests themselves, and the extreme fractionation makes productive use of the land difficult. In the ILCA, Congress intended to address that problem.

The Act has operated as intended for more than 11-1/2 years since it was amended, and for almost nine years since this Court's decision in *Hodel* v. *Irving*. The Department of the Interior estimates that between 9,300 and 14,880 estates involving escheatable interests have been probated under the amended Act in the Ninth Circuit alone. The court of appeals' decision now calls the settlements of those estates into question, erects an obstacle to the implementation of an important Act of Congress in the Ninth Circuit, and creates substantial uncertainty regarding the validity and operation of the Act throughout the nation.[7] In this case, for example, although

[7] The only other court that has ruled on the constitutionality of the amended Section 207 is the District Court for the Western District of Wisconsin. That court recently declined to follow *Youpee*, holding that the Ninth Circuit's decision "gives undue weight to the Court's statements in *Hodel* concerning the importance of the right to pass on property to one's heirs and too little weight to other aspects of the opinion," especially "the Court's emphasis on 'the continuing vitality' of the cases recognizing the sovereign's right to adjust the rules governing descent and devise of property." *Klauser* v. *Babbitt*, No. 95-C-193-C, 1996 WL 96637, at *9 (Mar. 1, 1996). That court declined to "read[] *Hodel* as carving out an entirely new right to pass on property to one's heirs free of governmental regulation." *Ibid.* Noting that the 1984 amendments also corrected the original Act's "lack of fit between the means chosen" and the statutory goal of consolidation, the court in *Klauser* found the amended Act constitutional. *Ibid.*

William Youpee was a member of the Fort Peck Tribes, whose Reservation is in the Ninth Circuit, some of the fractional interests that were subject to escheat in this case were situated on the Standing Rock and Devils Lake Sioux Reservations in South Dakota in the Eighth Circuit.[8]

For the foregoing reasons, review by this Court is warranted to resolve whether Congress's effort to address the problem of extreme fractionation of Indian lands is constitutional.

[8] Because a decedent's property may be located in different circuits, and the decedent's heirs or devisees may reside (and therefore sue) in different circuits, there is a substantial potential for confusion in many cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35415

MARVIN K. YOUPEE, SR.; CARY G. YOUPEE; DARLAN D. YOUPEE; ALLEN F. YOUPEE; HELEN YOUPEE-RICKER; WILLIAMETTE Y. BUSSARD, PLAINTIFFS-APPELLEES

v.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

[Filed: Sept. 5, 1995]

Before: WRIGHT, BEEZER and HAWKINS, Circuit Judges.

OPINION

BEEZER, Circuit Judge:

Congress has tried for many years to solve the problem of fractionation of Indian lands. The Su-

preme Court held Congress' first effort, Section 207 of the Indian Land Consolidation Act, an unconstitutional taking without just compensation. Congress' second effort, amended Section 207, is before us now.

The district court held that amended Section 207 of the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2206, violates the Takings Clause of the Fifth Amendment. The district court also enjoined the defendants from acting under Section 207 to escheat certain lands to Indian tribes. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

In the late Nineteenth Century, Congress initiated an Indian land policy under which lands would be allotted to individual members of Indian tribes. General Allotment Act of 1887, ch. 119, 24 Stat. 388.[1] The land was held in trust by the Government for a specified period of time and then descended according to the law of the state in which the land was located. After 1910, allottees were permitted to devise the allotted land by last will and testament in accordance with regulations promulgated by the Secretary of the Interior.

This land allotment policy led to disastrous results for the Indians. As successive generations came to hold the land, large parcels of land became fractionated into multiple undivided interests, with some parcels having dozens of owners. Representative Howard, in discussing the Indian Land Reorganization Act of 1934, explained the problem:

[1] Lands in the Fort Peck Reservation were allotted to individual Indians under The Fort Peck Allotment Act of 1908, ch. 237, 35 Stat. 558, and the General Allotment Act of 1887, ch. 119, 24 Stat. 388.

> On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income.

78 Cong.Rec. 11,728 (1934) *quoted in Hodel v. Irving*, 481 U.S. 704, 708, 107 S.Ct. 2076, 2079, 95 L.Ed.2d 668 (1987).

Recognizing the problem, Congress discontinued further Indian land allotment. Indian Reorganization Act of 1934, 25 U.S.C. § 461. The land allotments continued to splinter, however, as each landowner generally had more than one heir. Congress then enacted ILCA in 1983. The escheat provision, Section 207, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall decedent [*sic*] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Hodel, 481 U.S. at 709, 107 S.Ct. at 2079. Congress did not provide for compensation to the landowner of the land subject to escheat. *Id.*

The escheat provision was challenged by the heirs or devisees of members of the Oglala Sioux Tribe. At the time of their deaths, the decedents owned fractional interests in land subject to the escheat provisions. *Id.* The Eighth Circuit held that the statute

violated the Takings Clause because it did not provide compensation to the decedents' estates. *Irving v. Clark*, 758 F.2d 1260 (8th Cir.1985). *Irving* held that the General Allotment Act granted each decedent a vested right of transferring an interest in land at death, thus invoking Fifth Amendment protection. *Id.* at 1268-69.

The Supreme Court affirmed. *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). The Court first noted that the plaintiffs had standing to challenge the escheat provision. The plaintiffs suffered injury-in-fact, satisfying Article III of the Constitution, because they were deprived of fractional interests they otherwise would have inherited. *Id.* at 711, 107 S.Ct. at 2080. The plaintiffs also satisfied the prudential standing doctrine because they could appropriately assert the claims of the decedents. *Id.* The Court then held that Section 207 of ILCA constituted an unconstitutional taking. While recognizing Congress' broad powers to regulate Indian land, the Court held that the escheat provision at issue "went too far" and that it was an extraordinary regulation of privately owned land. *Id.* at 716, 718, 107 S.Ct. at 2083, 2084.

First, the Court noted that while the income generated by the individual parcels may be de minimis, the value of the land itself may not be. *Id.* at 714, 107 S.Ct. at 2082. Second, the statute was unconstitutional because it completely abrogated a decedent's right to transfer land, thereby destroying "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 716, 107 S.Ct. at 2083 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979)). Although the

decedents could enjoy the use of the land during their lifetime and could transfer the land *inter vivos*, "the right to pass on valuable property to one's heirs is itself a valuable right." *Id.* at 715, 107 S.Ct. at 2082. The Court observed that the statute abolished the right to devise even when consolidation of the land could occur.

Finally, the Court recognized the serious problem of extreme fractionation of Indian lands. The Court encouraged Congress to ameliorate this problem and suggested that some regulation of descent and devise of Indian lands may be appropriate. *Id.* at 718, 107 S.Ct. at 2084.

While *Hodel* was pending before the Eighth Circuit, Congress amended the escheat provision of ILCA. However, the Supreme Court declined to address the amended version because none of the land at issue escheated pursuant to the amended statute. The amended version is the subject of this appeal.

The escheat provision was amended in three significant respects. First, the class of land subject to escheat was narrowed. The definition of "fractional interest" changed to a 2 per centum or less interest in a parcel which did not earn $100 in any of the *five* years prior to the date of the decedent's death. 25 U.S.C. § 2206(a). Second, the statute permits landowners to devise their interest to any other owner of an undivided fractional interest. 25 U.S.C. § 2206(b). Finally, the statute permits a tribe to adopt its own laws governing the disposition of escheatable interests, subject to the approval of the Secretary of the Interior. Under amended Section 207, the Secretary may not approve any tribal law which "fails to accomplish the purpose of preventing further descent

or fractionation of such escheatable interests." 25 U.S.C. § 2206(c).[2]

II

William Youpee ("Mr. Youpee") was an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. He died testate on October

[2] The text of amended 25 U.S.C. § 2206 provides:

(a) Descent or distribution

No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Escheatable fractional interest

Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Adoption of Indian tribal code

Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

19, 1990. During his lifetime, he possessed several undivided interests in allotted trust land on various Indian reservations.[3] The plaintiffs, Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Williamette Y. Bussard and Darlan D. Youpee ("the plaintiffs") are enrolled members of the Fort Peck Tribes and are the children and potential heirs of William Youpee.

Mr. Youpee's estate was assigned to a Department of the Interior Administrative Law Judge ("ALJ") to determine the heirs of Mr. Youpee and claims against his estate. At a hearing, the ALJ stated that various certified interests would escheat to various tribes under the amended ILCA, based on Bureau of Indian Affairs certifications that Mr. Youpee's interest in the allotments at issue was 2% or less and the designated devisees were not owners of existing shares of any of the allotments. The plaintiffs did not present any evidence to rebut the presumption of escheat. In April 1992, the ALJ issued an order validating Mr. Youpee's 1981 will and decreed the partial distribution of Mr. Youpee's estate.

The plaintiffs appealed the decree of the partial distribution to the Department of the Interior Board of Indian Appeals arguing that the escheat provisions of ILCA were unconstitutional. The Board of Indian Appeals dismissed this appeal stating that it did not have jurisdiction to determine constitutional issues.

[3] The Government does not contest Mr. Youpee's possession of a vested property right in the undivided interests which is protected by the Fifth Amendment. *See Irving v. Clark*, 758 F.2d 1260, 1262 (8th Cir.1985) ("[V]ested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens.").

The plaintiffs then filed this action in the district court against Defendant Bruce Babbitt, his agents and assigns ("the Government"). The district court granted summary judgment in favor of the plaintiffs holding that they had standing to assert Mr. Youpee's claim and declaring that amended Section 207 of ILCA violated the Takings Clause of the Fifth Amendment. The Government timely appealed. On appeal, the Government concedes that the plaintiffs have standing to assert the claim of their father but contests the declaratory and injunctive relief ordered by the district court.

III

We review de novo the grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). A challenge to the constitutionality of a federal statute is also reviewed de novo. *Apache Survival Coalition v. United States*, 21 F.3d 895, 901 (9th Cir.1994).

IV

The Government argues that amended Section 207 cures the unconstitutional flaws of the original version. It contends that the original version was declared unconstitutional because of the statute's extraordinary character of completely abolishing both descent and devise. The amended version does not possess this extraordinary remedy, because it permits the devise of land, restricting only the class of persons who may inherit the land. Unlike the complete abrogation in *Hodel*, the amended statute only partially abrogates Indian landowner rights and, as such, does not violate the Takings Clause.

In contrast, the plaintiffs argue that the amended statute is unconstitutional because the right of

descent is still completely abolished. Further, for a class of Indian landowners, the right to *devise* is also completely abrogated. They state that the bulk of the allotments in question have descended through the generations. Although a decedent may devise escheatable land to heirs that possess a share of the allotment, in very few circumstances will lineal heirs possess an interest in trust land that their parent has inherited by lineal descent. In practice, then, a decedent will have to choose to devise the land to a collateral heir or a stranger, or allow it to escheat to the tribe. In most cases, a landowner will be indifferent between these alternatives and will allow the land to escheat upon death. Thus, the amended version produces the same evil as the original; certain Indian landowners are prohibited from conveying their land by both descent and devise.

In *Hodel*, the Supreme Court applied the three part takings test enunciated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). In considering whether a statute constitutes a taking, the Court has examined the taking question by "engaging in essentially ad hoc, factual inquiries" that have identified several factors. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. These factors include (1) the economic impact of the statute; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. *Id.* We next discuss this test as applied in *Hodel* and as it applies to the amended statute.

First, the Court noted in *Hodel* that the economic impact of ILCA could be substantial. While the income *generated* from the parcel may be de minimis, the value of the land itself may not be. *Hodel*,

481 U.S. at 714, 107 S.Ct. at 2082. The Government argues that the amended statute cures this defect because, instead of looking back only one year to determine whether the land has produced $100 in income, the amended statute looks back five years. This argument misses the point. The Court focused on the value of the land itself, i.e., its fair market value if sold. While the income generated from a parcel of land may be a contributing factor in computing its fair market value, it is not the only factor. The parcels of land involved in *Hodel* were valued at $2,700 and $1,816, which the Court found were "not trivial sums." 481 U.S. at 714, 107 S.Ct. at 2082. In this case, Mr. Youpee's fractional interests are valued at $1,239, not significantly less than the land involved in *Hodel*. Thus, despite Congress' attempt to minimize the statute's economic impact, the amended statute has not cured this defect.

In *Hodel*, the Court held that the second factor, the decedents' investment backed expectations, was not implicated by ILCA. The Court determined that the allotments are generally held for lease rather than improved and used by the owners and generate little income for the individual owners. 481 U.S. at 715, 107 S.Ct. at 2082. We agree with the Government that this analysis applies equally to the amended statute and this factor weighs in favor of the statute's constitutionality.

The third and most important factor, however, is the nature of the Government's regulation of the decedent's land. The key distinction between the original and the amended versions of the statute is the permissibility of devise to any other owner of an undivided interest in the parcel of land. The Supreme Court stated, in dicta, that some restriction on the

right to devise fractional land interests may be permissible:

> There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat . . . . It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property.

Hodel, 481 U.S. at 718, 107 S.Ct. at 2084 (internal citations omitted).

This paragraph supports the Government's position that the United States can restrict the descent of fractional interests. This statement also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional.

However, the amended escheat provision goes further than the Supreme Court's dicta. The amended statute approaches the problem from the opposite end of the Court's proposed solution. Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a

very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest. Thus, under ILCA, many decedents will be unable to transfer land to their heirs, which *Hodel* recognizes is "itself a valuable right." 481 U.S. at 715, 107 S.Ct. at 2082.

The amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel. The amended statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners.

While we hold that the amended statute is unconstitutional, Congress may pursue other options to achieve consolidation of the innumerable fractional interests. For instance, the Government may purchase the land, it may condemn the land for a public purpose and pay just compensation, or, as *Hodel* states, it may regulate in some limited fashion the devise and descent of fractional interests to prevent further fractionation. However, as with the statute before the Supreme Court in *Hodel*, we hold that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV-93-21-BLG-JDS

MARVIN K. YOUPEE, SR., CARY G. YOUPEE, DARLAN D. YOUPEE, ALLEN F. YOUPEE, HELEN YOUPEE-RICKER, AND WILLIAMETTE Y. BUSSARD, PLAINTIFFS

v.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT

[Filed: Mar. 3, 1994]

MEMORANDUM AND ORDER

SHANSTROM, District Judge.

Plaintiffs, enrolled members of the Fort Peck Tribes, have filed this action seeking declaratory and injunctive relief. Specifically, plaintiffs seek a declaration that section 207 of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2210 (hereafter ILCA), violates the Fifth Amendment in authorizing a taking of real property without just compensation. Plaintiffs also seek injunctive relief preventing defendant

Babbitt and his agents from acting under section 2206 to escheat certain land to Indian tribes. The parties have filed cross-motions for summary judgment.

I

FACTUAL AND LEGAL BACKGROUND

A. Statutory and Case Law History

In 1983, Congress enacted the ILCA to ameliorate the mounting effects of the Indian General Allotment Act of 1887. This allotment legislation provided that each Indian would receive certain acreage. Fort Peck and other reservations were allotted under the provisions of the Act. Chapter 119, 24 Stat. 388, 25 U.S.C. § 348. Under the Act, the allotted land would remain in trust for 25 years, and during that period descend according to the laws of the state where the land was located. 25 U.S.C. § 348.

As successive generations came to hold the allotted lands, the parcels became splintered into multiple undivided interests, with some parcels having numerous owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew worse because each property owner was apt to have more than one heir. So too grew the difficulties of managing property held in this manner and having it maintain its value due to the divisibility problems caused by multiple ownership. *Hodel v. Irving*, 481 U.S. 704, 707, 708, 107 S.Ct. 2076, 2078, 2079, 95 L.Ed.2d 668 (1987).

In response, Congress ended further allotment of Indian lands by enacting the *Indian Reorganization Act of 1934*. Chapter 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq*. However, this did not end the further compounding of fractionation which had already been set in motion. *Id*., at 708, 107 S.Ct., at 2079.

Congress then passed the ILCA in 1983. Section 207, the escheat provision of the ILCA, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [by intestacy or devise] but shall escheat to that tribe if such interest represents two percentum or less of the total acreage in such tract and has earned to its owner less than $100.00 in the preceding year before it is due to escheat. 96 Stat. 2519.

Id., at 709, 107 S.Ct. at 2079. Congress made no provision for the payment of compensation to the owners of interests covered by section 207.

Section 207 of the ILCA was challenged on Fifth Amendment grounds in the United States District Court for the District of South Dakota. That court upheld its constitutionality. In 1984, while that case was on appeal to the United States Court of Appeals for the Eighth Circuit, Congress amended the ILCA, including section 207, in P.L. No. 98-608, 98 Stat. 3171, 3173. *Irving v. Clark*, 758 F.2d 1260, 1261 n. 1 (8th Cir.1985). 25 U.S.C. § 2206 is the amended version of section 207.

The amended version redefines "fractional interest" to mean one where it has earned less than $100.00 in any one of five (5) years prior to decedent's death. Plaintiffs represent that this change was made to prevent the escheat of land which, although failing to earn $100.00 in the year immediately preceding decedent's death, had, in prior years, been shown to be valuable.

Secondly, the amended version permits a [*sic*] the devise of escheatable interests "to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." 25 U.S.C. § 2206(b). Lastly, the statute provides that the escheat provisions of the ILCA may be superseded by a tribal scheme approved by the Secretary of Interior. It directs the Secretary not to approve any plan, however, that "fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. § 2206(c).

As indicated above, in *Irving v. Clark*, 758 F.2d 1260 (8th Cir.1985), the Eighth Circuit considered the constitutionality of the ILCA's escheat provision. In *Irving*, the heirs and devisees of deceased members of the Oglala Sioux Tribe argued that the escheat provision deprived them of property without just compensation in violation of the Fifth Amendment. *Id.*

The Eighth Circuit concluded that the provision violated the Fifth Amendment in not providing compensation to the decedents' estates. That court grounded its decision on the finding that each Indian allottee gained, through the General Allotment Act, the vested right of passing his or her interests in their land at death, thus invoking Fifth Amendment protection. *Id.*, at 1268, 1269.

The Eighth Circuit noted that the escheat provision had been amended after oral arguments were heard. It found, however, that "its operation as challenged here is unaffected and the parties have not suggested that any of the changes put the plaintiffs outside the provisions coverage." *Id.*, at 1261 n. 1.

The United States Supreme Court affirmed the Eighth Circuit in *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). The Court noted

that the Eighth Circuit had declared that not only the original version of section 207, but also the amended version *not before it*, unconstitutionally took property without compensation. In response, it stated:

> Since none of the property which escheated in this case did so pursuant to the amended version of the statute, this "declaration" is, at best, dicta. We express no opinion on the constitutionality of section 207 as amended.

The *Hodel* court determined that the heirs and devisees had standing to challenge section 207. *Id.*, at 711, 712, 107 S.Ct., at 2080, 2081. It noted that in enacting section 207, which precluded the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of Indian ancestral lands. *Id.*, at 712, 107 S.Ct., at 2081. Due to the highly fractionated ownership, these lands had been generally held for lease rather than improved and used by the owners. *Id.*, at 715, 107 S.Ct., at 2082. Encouraging the consolidation of Indian lands, therefore, was a public purpose of high order and the Court acknowledged that the fractionation problem on reservations may call for dramatic action to encourage consolidation. *Id.*, at 712, 107 S.Ct., at 2081.

Noting that the government had considerable latitude in regulating property rights of owners, the Court nevertheless found that the right to pass on property to one's heirs to be a valuable right. *Id.*, at 716-17, 107 S.Ct., at 2083-84. It also found that although the income from the land parcels could be properly deemed *de minimus*, the value, itself, of the parcels may not be. The BIA placed total approximate

values of $2,700.00 and $1,1816.00 [*sic*] on the escheatable interests. *Id.*, at 714, 107 S.Ct., at 2082.

The Court determined that section 207 completely abolished both descent and devise of these property interests. This occurred even when the passing of the property to an heir may result in consolidation of property—as, for instance, when the heir already owns another undivided interest in the property. *Id.*, at 716, 107 S.Ct., at 2083. Since the escheatable interests were not necessarily *de minimus*, and the availability of *inter vivos* transfer did not obviate the need for descent and devise, the Court determined that a total abrogation of these rights may have been a taking and could not be upheld. *Id.*, at 717, 107 S.Ct., at 2084.

Three concurring opinions were written in *Hodel v. Irving*, *id.*, at 705, 107 S.Ct., at 2077. Justices Brennan and Scalia disagreed in their concurring opinions as to whether this decision limited the scope of a prior taking decision, *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). *Id.*, 481 U.S., at 718-19, 107 S.Ct., at 2084-85. Justice Stevens used a different analysis than the majority opinion. He relied upon the Due Process Clause of the Fifth Amendment in finding that the ILCA failed to give the heirs a fair opportunity to make arrangements to avoid operation of its escheat provision. *Id.*, at 728-30, 107 S.Ct., at 2089-91.

B. The Facts of this Case

The statutory and case law history recounted above serve as a back drop for the presentation of the facts and issues in this case.

William Youpee was an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. William Youpee died on October 19, 1990 at the age of 75. During his lifetime, he possessed, by devise or descent, undivided interests in allotted trust land on several Indian reservations. Plaintiffs are the potential heirs of William Youpee. At the time of Youpee's death, plaintiffs did not have any interest in his undivided trust land. Plaintiffs assert that Youpee was never notified in his lifetime that any of his heirship interests fell under the ILCA, were less than 2% of each allotment, or would escheat to the tribes.

Youpee's estate was assigned to Department of the Interior Administrative Law Judge (ALJ) Vernon Rausch to determine the heirs to and claims against the estate. ALJ Rausch held a hearing at Poplar, Montana on August 5, 1991. At this hearing, a 1981 will and last testament of William Youpee was placed into evidence. At the hearing, the ALJ stated that various certified interests would escheat to various tribes under the amended ILCA.

During the hearing, plaintiffs presented no evidence to rebut the presumption of escheatment under the ILCA. Plaintiffs did not raise the issue of whether decedent's interest in the certified allotments produced any income which would remove those interests from the category of escheatable property.

Plaintiffs assert that the heirs of the decedent heard for the first time at the hearing about the ILCA. They assert they were never told to produce evidence to rebut the presumption of escheatment. They also state that they were not advised at the

hearing that they could submit evidence post-hearing to rebut the presumption.

On April 28, 1992, the ALJ issued an order that approved the decedent's 1981 will, and decreed the partial distribution of William Youpee's estate. A final decree has not been issued because the estate has remained open while the paternity of Robert Martin, a Fort Peck Sioux who claims he is the illegitimate son of William Youpee, is determined.

In his partial decree, ALJ Rausch ruled that decedent Youpee's interest in several allotments on the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations escheated to these respective tribal governments under the ILCA. This decision was based on BIA certifications from each agency that the decedent's interest in specific allotments was 2% or less undivided interest in an allotment, and that the designated devisee was not an owner of an existing share of that allotment.

ALJ Rausch also ruled that the 1981 will was the decedent's last will and testament, as a more recent will had not been signed. Plaintiffs assert that the more recent will, drafted in 1987, was presented to the decedent. After ALJ Rausch denied a rehearing on July 14, 1992, plaintiffs appealed the decree of partial distribution to the Department of Interior Board of Indian Appeals on the issue that escheatment of the decedent's land was unconstitutional. On August 25, 1992, that board dismissed plaintiffs' appeal because it was without jurisdiction to determine constitutional issues. Thereafter, plaintiffs filed this action.

II

DISCUSSION

The parties have framed two issues for decision by this Court. The first is whether plaintiffs have standing in this matter. The second is whether the amended escheat provision of the ILCA violates the Fifth Amendment to the Constitution.

A. Standing

In *Irving v. Clark*, 758 F.2d, at 1267-68, the Eighth Circuit concluded the heirs had standing to challenge the escheat provision. The challenge there was that the statute deprived them of property without just compensation. *Id.*, at 1261. On review, the Supreme Court, in *Hodel v. Irving*, 481 U.S., at 711, 107 S.Ct., at 2081, found that the heirs met constitutional standing requirements along with prudential standing criteria imposed by courts on assertions of third-party standing. In light of the factual and legal similarities between the heirs in that case and the heirs here, the ruling in *Hodel* as to standing appears applicable.

Further, the prudential criteria recognized by the Ninth Circuit in *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1411 (9th Cir.1993), are satisfied here. These criteria are that the plaintiff must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the plaintiff must have a close relation to the third-party; and there must exist some hinderance to the third-party's ability to protect his or her own interests. *Id.*

Here, the injury-in-fact criteria is met because this statute has deprived the plaintiffs of the fractional interest they otherwise would have inherited. The second and third criteria are met by virtue of the fact that the plaintiffs' decedent is deceased and can no longer challenge the operation of this statute on his own behalf.

B. Constitutionality

Defendant stresses that the objection of the *Hodel* court to the original escheat provision was its extraordinary character in abolishing *both* descent and devise, even when the passing of the property to the heir might result in consolidation of property. However, defendant asserts the amended version corrects the defect because, although still prohibiting intestate descent, the right to devise property is now permitted if the devisee owns an existing interest in that property.

Plaintiffs' position is that, notwithstanding this amendment, the right of descent still remains abolished regardless of the heir's status. Further, plaintiffs state that Indians under the age of 18 (28 U.S.C. § 373), incompetent Indians, or those without heirs who have an interest in the land are not allowed the option to execute wills to devise their land. Therefore, as to these groups, the passing by both devise and descent is still precluded.

Specifically, plaintiffs assert that the right to devise is of little consolation to persons such as William Youpee, who did not have lineal heirs who possessed an interest in his allotment. They maintain that in very few circumstances will a child of a decedent possess an interest in trust land that his parent has inherited by lineal descent. Lineal descent

is, therefore, sharply curtailed. As a result, plaintiffs assert that the ILCA places many Indian land owners in the possession of either devising land to a collateral heir or allowing the land to escheat to the tribe.

Plaintiffs argue, then, that the amended ILCA is unconstitutional because it produces the same evil of the original Act, i.e., prohibiting certain Indians (incompetents, those under 18, and those without heirs having an interest in the land) from passing their land by devise and descent.

The *Hodel* court found the original escheat provision to violate the "taking clause" of the Fifth Amendment in its extraordinary abrogation of both descent and devise of these property interests, even when the passing of property to an heir might result in consolidation of property. Thus, even when there was no conflict between the governmental purpose here—property consolidation and the property owner's rights of descent and devise—these rights were, nevertheless, completely abolished under the original escheat provision. *Id.*, 481 U.S., at 718, 107 S.Ct., at 2084.

The amended escheat provision corrects the defect of abolishing devises which would result in consolidation. However, for those property owners who are not legally capable of devising property, or for those like William Youpee, who do not have an heir who possesses an undivided interest in the escheatable property, the statute, as amended, continues to allow the total abolition of both descent and devise of such property.

The *Hodel* court found that the original escheat provision "goes too far." *Id.*, at 718, 107 S.Ct., at 2084. Part of its concern appeared to be that the statute frustrated devise even when it would have accom-

plished land consolidation. *Id.* However, it also found the statute to be extraordinary in character by its *per se* total abolition of descent and devise. It stated:

> If we were to stop our analysis at this point, we might well find sec. 207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna v. United States*, 444 U.S. [164], at 176 [100 S.Ct. 383, at 391, 62 L.Ed.2d 332], we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to ones heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Tr. of Oral Arg. 12-14. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.

Id., 481 U.S. at 716, 107 S.Ct., at 2083.

In its history of examining whether a regulation of property amounts to a taking requiring just compensation, the Supreme Court has applied various tests. Peterson, *The Takings Clause: In Search of Underlying Principles*, Part I—A Critique of Current

Takings Clause Doctrine, 77 California L.Rev. 130 (1989). In *Hodel*, it utilized the three-factor test espoused in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125-127, 98 S.Ct. 2646, 2659-2661, 57 L.Ed.2d 631 (1978). These three factors are the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Hodel*, 481 U.S., at 714, 107 S.Ct., at 2082.

It was to the *Hodel* court the extraordinary character of the government regulation which made this statute unconstitutional. *Id.*, 481 U.S., at 716, 107 S.Ct., at 2083. I do not deem the amendment to the escheat provision insignificant. First, it avoids the escheat of certain interests which may have been escheated under the original ILCA. To that extent, the impact of the regulation is mitigated. Secondly, it makes consolidation through devise possible, whereas under the original provision it was not. To that extent, it further promotes the legitimate government interest here of ameliorating fractionation—which I agree is a most serious problem.

Nevertheless, in balancing the interests involved, I find that the statute still retains the elements of a compensable government action. Property interests of the decedent and other certain classes of Indians, which are well entrenched in our society, remain totally and completely abrogated.

CONCLUSION

In light of the above, I find that defendant should be enjoined from escheating to the Indian tribes the land of plaintiffs' decedent. I further find that the escheat provision under the ILCA is unconstitutional as violating the "takings clause" of the Fifth Amendment.

Accordingly,

IT IS ORDERED that plaintiffs' motion for summary judgment is granted.

APPENDIX C

IN REPLY REFER TO:
IP TC 176R 91

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
Room 688 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

IN THE MATTER OF THE ESTATE
OF WILLIAM YOUPEE
FORT PECK A02152

ORDER APPROVING WILL
AND
DECREE OF PARTIAL DISTRIBUTION

This case coming on to be heard before the Administrative Law Judge, Office of Hearings and Appeals, Twin Cities, Minnesota, and upon submission of the evidence, the following facts and conclusions of law are presented:

A hearing was duly held at Poplar, Montana on August 5, 1991 for the purpose of ascertaining the heirs at law of the decedent, and the facts and circumstances surrounding the execution of a typewritten instrument dated August 5, 1991, titled "Last Will and Testament of William (NMI) Youpee."

FACTUAL FINDINGS

The evidence on file indicates decedent was born on or about December 19, 1913 and died on October 19,

1990, a resident of the State of Montana at the time of his death.

Decedent's parents were: Frank Youpee, who died in 1954, and Helen Lester, who died in 1984. Both were Fort Peck allottees.

Decedent married several times during his lifetime, his last marriage having been to Eloise Letha Redd, a Fort Peck unallotee, and although it appears there was a pending divorce action in tribal court, they were not legally divorced. Eloise Letha Redd died as a result of the same common accident which caused the instant death of the decedent. No children were born of this marriage.

The following children were born of his marriage to Isabelle Weinberger, a Fort Peck allottee, who died in 1973: Williamette, Helen, Allen, Darlan, Isabelle, Josephine, William Jr. (who died in 1975), Dorothy, Gretchen, Thomas (who died in 1977), Cary, and Marvin. Decedent's son, William Jr., was survived by one child, namely, Leslie Kim Gibbs/Youpee, and decedent's son, Thomas, was survived by one child, namely, Dustin Jade Youpee.

It appears decedent's wife, Isabelle, had a son, Arrow Weinberger, who was born on 8/6/38, prior to his marriage to Isabelle, said child having been adopted by his maternal grandmother, Ida Weinberger. His adoption bars him from inheriting in this estate.

Robert Martin, who was born 10/25/39 to Ruby Vivian Martin Archdale, has also alleged that he is the son of the decedent. The question of his paternity has not yet been resolved in this proceeding.

Decedent did not adopt any children nor were any of decedent's own children adopted by other parents.

HEIRS AT LAW

Had decedent died intestate, his heirs at law, determined in accordance with the laws of descent and distribution in the States of Montana and North Dakota (Mont. Code Ann., Sec. 72-2-203(1) (1983) and (N. D. Cent. Code, Sec. 30.1-04-03(1) (1976)) and pursuant to the Act of 6/17/80, Pub.L. 96-274, 94 Stat. 537 would be his surviving children and the children of his prior deceased children, each entitled to an equal share.

THE WILL

Under the provisions of decedent's last will and testament dated March 5, 1981, Clause First, he bequeaths $10.00 to his wife, Elaine [sic] Letha Redd Youpee. As heretofore stated, she died on the same date as the decedent, and thus this provision of the Will can be ignored, since it is only a token bequest.

In Clause Third, he devises his interest in Allot. 3311, Anges Myrick, Jr., to his daughter, Dorothy Lorene Youpee LaFromboise. Records of the Fort Peck Indian Agency indicate the decedent, in fact, gift-deeded or conveyed his interest in that property during his lifetime to his daughter, Isabelle Florence Youpee.

In Clause Fourth, he attempts to devise his interest in the surface only of two tracts in the Mary Ricker allotment, to his son, Marvin Kurt Youpee, described in the Will as: NW1/4NE1/4, Sec. 1, T.28N., R.51E., MPM and NW1/4NE1/4, Sec. 17, T28N., R. 51E., MPM. The Mary Ricker allotment is Id. No. 794. Only the NW1/4NE1/4, Sec. 17, T28N., R. 51E., MPM was part of that allotment. The other description listed, NW1/4NE1/4, Sec. 1, T.28N., R. 51E., MPM, is part of Allotment 189, Rose Cooley. The decedent never owned an interest in the allotment of

Rose Cooley, No. 189. The share he owned in the allotment of Mary Ricker, NW1/4NE1/4, Sec. 17, T28N., R. 51E, MPM, he conveyed to his daughter, Josephine, and therefore, none of the property devised in Clause Fourth can pass to the devisee, Marvin Kurt Youpee.

In Clause Fifth, he devises his interest in the Helen Youpee Brushorn allotment, described in the Will, to his son, Cary George Youpee.

In Clause Sixth, he devises his interest in the surface only in the Lulu Rena Lester allotment, described in the Will, to his son, Allen Frank Youpee, Sr.

In Clause Seventh, he devises his interest in Allot. 3306, Vivian Weeks, and Allot. 1547, Josephine Mitchell, to his son, Darlan Dwight Youpee.

In Clause Eighth, the decedent gives, devises and bequeaths "to all of my children," my Allotment, 2152, in equal shares, to share and share alike. Because the paternity of Robert Martin has not yet been determined, distribution of this property cannot be decreed in this Order but will be so done in a subsequent modification or adjudication.

In Clause Ninth, the decedent devises his interest in Allot. 2685, Marjorie Weeks Youpee, to his daughter, Gretchen Marie Youpee.

In Clause Tenth, the decedent devises his interest in Allot. 154, Weinberger, to his daughter, Isabelle Florence Youpee Gobert. It appears this devise contains a typographical error, as the allotment of Weinberger is 954. Furthermore, Allotment 154 is that of Susan Cain Moore and the decedent does not own a share or interest therein.

In Clause Eleventh, the decedent devises his interest in Allot. 956, Eagle Hear [sic] (should be

Eagle Bear), to his daughter, Helen Francis Youpee Ricker.

In Clause Twelfth, the decedent devises his interest in any townsite lots in Poplar, Montana, in which he owns an interest, together with improvements thereon, to his daughter, Josephine Marla Youpee. The Fort Peck Indian Agency has indicated decedent had a 13/39 interest to the East 25 ft. of Lots 17, 18 and 19 in Block 22, and that he gift-deeded that property to Josephine Youpee during his lifetime.

In Clause Thirteenth, he devises his interest in the Isabelle F. Weinberger Youpee allotment, described in the Will, to his daughter, Isabelle Florence Youpee Gobert.

In Clause Fourteenth, the decedent devises his interest in three allotments, Hugh Eagle Bear, Lame Soldier, and Little Head, described in the Will, to his daughter, Helen Francis Youpee Ricker.

In Clause Fifteenth, the decedent devises his interest in the following allotments to his daughter, Josephine Marla Youpee: Allotments 1841, Jeff Boyd; 1855, Nellie Boyd; 1857, Archie Boyd; 2247, Pearl Boyd; 429, William Boyd; and 98, John Boyd.

In Clause Sixteenth, the decedent devises his interest in Allotment 169, Chief Ghost Little Santee, and Allotment 170, Chief Ghost Little Santee, to his daughter, Helen Francis Youpee Ricker. Because the decedent's interest in said allotments is less than 2% and Helen Ricker is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Seventeenth, the decedent devises his interest in Allotment 349B, Mercy Recette, to his daughter, Gretchen Marie Youpee. There appears to

be a typographical error as to the number. It should be 3498, not 349B.

In Clause Eighteenth, the decedent devises his interest in Allotments 517, Lewis Lambert; 518, Lizzie Lambert; and 527, Florence Lambert; to his daughter, Williamette Belle Youpee Bussard. Because the decedent's interest in said allotments is less than 2% and Williamette Bussard is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Nineteenth, the decedent devises is interest in Allotment 347, Maud Four Spider, to his son, Allen Frank Youpee. Because the decedent's interest in said allotments is less than 2% and Allen Frank Youpee is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twentieth, the decedent devises his interest in Allotment 428, Good Woman Hunter, to his daughter, Helen Francis Youpee Ricker.

In Clause Twenty-First, the decedent devises his interest in Allotment 825, Little Santee, to his son, Marvin Kurt Youpee. Because the decedent's interest in said allotment is less than 2% and Marvin Kurt Youpee is not a co-owner therein, that interest will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twenty-Second, the decedent devises his interest in Allotment 826, Braid Santee, to his son, Cary George Youpee. Because the decedent's interest in said allotment is less than 2% and Cary George Youpee is not a co-owner therein, that interest will

escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twenty-Third (23) of said Will the decedent bequeathed to each of his grandchildren one thousand dollars ($1,000). Although the Will goes on to identify by name eleven (11) grandchildren "as this is written", the Will must be construed to mean that the decedent intended for all of his grandchildren that were living as of the date of his death to receive the $1,000 bequest.

The rest and residue of decedent's property he gives, devises and bequeaths to his son, Darlan Dwight Youpee.

Because a final decree of distribution cannot be entered until there has been a supplemental hearing conducted and/or a compromise agreement reached regarding the alleged paternity of Robert Martin by the decedent, and because the attorney for the decedent's family has indicated that the family requests that the monetary bequests be granted or authorized at the earliest possible date, a Decree of Partial Distribution appears in order, and all property can be distributed *with the exception* of the property described in Clause Eighth of the Will.

THE PROPERTY

The decedent's trust or restricted real property is located on the Fort Peck, Standing Rock and Devils Lake Sioux Reservations. The devisees are entitled to take the property devised to them, unless other barred, as stated above, because of the provisions of the Indian Land Consolidation Act, as amended.

THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED

The Bureau of Indian Affairs has certified that the decedent's interests in the real property described on **Exhibits B, D and E** come within the purview of the Indian Land Consolidation Act of January 12, 1983, Pub.L. 97-459, 96 Stat. 2515, which Act was amended on October 30, 1984, Pub.L. 98-608, 98 Stat. 3171. Section 207 of said Act as originally enacted was declared unconstitutional by the Supreme Court of the United States in *Hodel* v. *Irving*, 481, U.S. 704, 95 L Ed 668, 107 S. Ct 2076 (May 18, 1987). However, the Supreme Court expressly did not rule on the constitutionality of the October 30, 1984 amendment.

In accordance with Departmental instructions dated June 16, 1988 from the Chief Administrative Law Judge, Office of Hearings and Appeals, distribution to the Tribe(s) of the decedent's escheatable interests in the property described on **Exhibit B** can now be ordered, as shown herein, since the Bureau of Indian Affairs has indicated the respective specific devisees and the residuary devisee are not co-owners therein, ***except for the*** property devised to decedent's daughter, Helen Frances Youpee Ricker in Clause Fourteenth of decedent's Will. Likewise, the Bureau has indicated that the residuary devisee is not a co-owner in decedent's interests described on **Exhibits D and E.**

CLAIMS

In an interim order entered by the undersigned on 8/5/91, the following claims were allowed, to be paid from funds in the estate account subject to the provisions of 43 CFR 4.251(d) that no payments shall

be made on these unpreferred claims after three (3) years from the date of allowance.

Unpreferred (43 CFR 4.251(a)(4):

$1,183.40 - Visa (charge card)
217.94 - Discover (charge card)
363.15 - Wards
918.89 - Sears
339.33 - J. C. Penney
1,073.79 - Firestone
370.07 - Optima
53.75 - Optima

In another interim order entered by the undersigned on 4/1/92, the following claim was also allowed:

$1,412.20 - Medquest/Dakota Credit

The Fort Peck Indian Agency has advised that all of the above claims have been paid in full.

There was also filed a claim for $68.25 by the Poplar Hospital. Information furnished the undesigned indicates the Indian Health Service has authorized payment of this Bill under authorization No. 09B0403541.

The only other claim filed was by the Diners Club for $598.00. Information now on file indicates this claim has either been paid in full or has been withdrawn for failure to provide adequate proof of the claim. Therefore, this claim is hereby denied.

THE ORDER

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. §372 (1982), as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. §373 (1982) and other applicable statutes, and pursuant to 43 CFR Part 4, the within-

described written instrument dated March 5, 1981 is hereby *approved* as decedent's Last Will and Testament.

IT IS ORDERED, That the Superintendent will cause to be made a distribution of the decedent's trust property, as shown below, *with the exception of Clause Eighth.*

The Superintendent is hereby further directed to retain in the estate account $3,000.00 until such time as a further adjudication or modification is entered, regarding the paternity of Robert Martin. In the event he is found to be the son of the decedent, said funds can be distributed by paying $1,000 to each of his three children, since they would also be grandchildren of the decedent "living" at the time of his death.

To: Cary George Youpee, 206-U06742

Decedent's interest in the allotment of Helen Youpee Brushorn, No. 1096-A, described on Exhibit A.

To: Allen Frank Youpee, Sr., 206-U04980

Decedent's interest in the allotment of Lulu Rena Lester, No. 787-A, described on Exhibit A.

To: Darlan Dwight Youpee, 206-U05104

Decedent's interest in the allotments of Vivian Weeks, No. 3306, and Josephine Mitchell, No. 1547, described on Exhibit A.

To: Gretchen Marie Youpee, 206-U08490

Decedent's interest in the allotments of Marjorie Weeks Youpee, No. 2685, and Mercy Recette, No. 3498, described on Exhibit A.

To: Isabelle Florence Youpee Gobert, 206-U07841

Decedent's interest in the allotments of Weinberger, No. 954, and Isabelle Weinberger, No. 2846 and M-2846 described on Exhibit A.

To: Helen Francis Youpee Ricker, 206-U04979

Decedent's interest in the allotments of Eagle Bear, No. 956, Good Woman Hunter, No. 428, M-428, 428-A and M-428-A, described on Exhibit A, and decedent's interest in the allotments of Hugh Eagle Bear, No. 295, described as Lots 1 and 2, Sec. 6, T. 27N., R.52E. and minerals only M-295A, described as: NE1/4SE1/4 Sec. 2, T.127N., R.52E.; Lame Soldier, No. 528 and M-528 described as the E1/2 Sec. 26, T.29N., R.52E.; Little Head, No. 566 and M-566, described as: E1/2NE1/4NE1/4; Sec. 5, T.27N., R.55E, and Bertha Little Head, No. 568-A and M-568-A, described as SE1/4NW1/4 Sec. 4, T.31N., R.55E., described on **Exhibit B.** (Helen is a co-owner.)

To: Josephine Marla Youpee, 206-U07843

Decedent's interests in the following allotments: 1841, Jeff Boyd; 1855 Nellie Boyd; 1857, Archie Boyd; 2247, Pearl Boyd; 429, William Boyd; and 98, John Boyd, all described on **Exhibit A.**

To: George Franklin Ricker, Jr. (dau. of Helen Ricker),
b. 1/4/69

To: Jonelle Ann Long (dau., of Isabelle Youpee),
b. 1/26/70

To: Leslie Kim Gibbs (dau., of Wm. Youpee, Jr.),
b. 6/6/70

To: Joseph Lester LaFromboise, (son of Dorothy LaFromboise),
b. 7/18/70

To: William Theodore Ricker (son of Helen Ricker),
b. 3/10/71

To: Allen Frank Youpee, Jr. (son of Allen Youpee, Sr.), b. 8/11/71

To: Jennifer Arlene Long, (dau. of Isabelle Youpee),
b. 10/4/71

To: Dustin Jade Youpee (son of Thomas Youpee),
b. 1/18/75

To: Anna Marie Blackbird (dau. of Gretchen Youpee),
b. 11/22/75

To: Royce Anthony LaFromboise, (son of Dorothy LaFromboise),
b. 11/18/79

To: Joseph Cloud Boy (son of Allen Frank Youpee),
b. 1/16/68

To: April Roll (dau. of Isabelle Youpee),
b. 4/2/86

To: Marvin Youpee, Jr. (son of Marvin Youpee),
b. 7/11/83

To: Cherish Miranda Youpee (dau. of Marvin Youpee),
b. 1/6/86

To: William Youpee III (son of Marvin Youpee),
b. 11/7/87

To: Iris Ariel Youpee (dau., of Marvin Youpee),
b. 8/3/90

Each the sum of One thousand dollars ($1,000.00)

To: The United States of America in Trust for the Assiniboine and Sioux Tribes, Fort Peck Reservation

All of decedent's interests in property described in Exhibit B, *except* decedent's interests in Allotments 295 and M-295-A, Hugh Eagle Bear; 528 and M-528, Lame Soldier; 566 and M-566, Little Head; and 568-A, M-568-A, Bertha Little Head (devised to Helen Francis Youpee Ricker in Clause Fourteenth).

To: The United States of America in Trust for the Standing Rock Sioux Tribe, Standing Rock Reservation, North and South Dakota

All of decedent's interests in property described on Exhibit D.

To: The United States of America in Trust for theDevils Lake Sioux Tribe, Devils Lake Reservation, North Dakota

All of decedent's interests in property described on Exhibit E.

To: Darlan Dwight Youpee, 206-U05104

All of the rest and residue of decedent's trust or restricted property, including the interests in property described on Exhibit A, which are not otherwise specifically devised, (viz. M-958) *except* any other real property interests which are subject to the escheat provisions of the Indian Land Consolidation Act, as amended, if any there be.

The trust or restricted real property interests of the decedent are appraised for probate purposes at $119,461.85. The estate account also contained funds in the approximate amount of $19,068.50 (as of 4/16/92).

Done at the Twin Cities, Minnesota and date *April 28 1992.*

/S/ VERNON J. RAUSCH
VERNON J. RAUSCH
ADMINISTRATIVE LAW JUDGE

[Appendices omitted]

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35415
D.C. No. CV-93-00021-JDS

MARVIN K. YOUPEE, SR.; CARY G. YOUPEE; DARLAN D. YOUPEE; ALLEN F. YOUPEE; HELENYOUPEE-RICKER; WILLIAMETTE Y. BUSSARD,
PLAINTIFFS-APPELLEES

v.

BRUCE BABBITT,
SECRETARY, DEPARTMENT OF INTERIOR,
AND HIS AGENTS, ASSIGNS,
AND SUCCESSORS IN OFFICE,
DEFENDANT-APPELLANT

[Filed: Dec. 5, 1995]

Before: WRIGHT, BEEZER AND HAWKINS, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Hawkins vote to reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service

has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.